APPEAL NO. 93262

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). On March 2, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The issues in dispute were:

1.Whether Claimant was injured in the course and scope of his employment on (date of injury).

2.Whether Claimant notified Employer of his injury no later than 30 days after (date of injury).

3.Whether Claimant sustained disability as a result of the claimed injury.

The hearing officer determined that claimant was injured in the course and scope of his employment on (date of injury), that he notified the employer of the injury within 30 days and that claimant has suffered disability as a result of the claimed injury from October 1, 1992 onward to the date of the CCH.

Appellant, carrier, contends that the hearing officer erred in concluding that claimant sustained an injury, and reported the injury within 30 days as being against the great weight and preponderance of the credible evidence, and that the hearing officer erred in admitting into evidence, over objection, the Employer's First Report of Injury and requests we reverse the hearing officer's decision and render a decision in its favor. Claimant did not file a response.

DECISION

The decision of the hearing officer is affirmed.

Claimant testified he was employed by (employer) as a cottonseed sampler, drawing samples of cottonseed off loaded trucks. The parties agreed that claimant was a temporary employee hired to collect cottonseed samples during the cottonseed receiving season. Claimant stated on (date of injury) he slipped while jumping off a truck onto the dock and fell, hurting his back, shoulder and ankle. (RG) was the laboratory technician and lead man who directed claimant's work. Claimant testified that he told his helper that he had fallen on the day of the accident. Claimant goes on to state that the following day he reported the accident and pain in his shoulder, back and side to RG. Claimant testified that the only thing RG said was to be more careful. Claimant states he told RG "more than three or four times" that he was having pain in his shoulder, back and abdomen. Claimant says he did not report the injury to anyone else until shortly before he was laid off when he reported the accident to (Mr. Y), employer's plant superintendent, on September 30, 1992.

RG testified at the CCH that claimant told him about the fall sometime before

September 30th, that it might have been a couple of days after the accident and that claimant said he fell on his buttocks. RG also testified that at some point claimant mentioned a pain in his side. The hearing officer notes in his discussion of the evidence that RG ". . . was very vague in his testimony about dates, but in a handwritten statement [RG] said Claimant complained to him on August 29 that he was having pain on the right side of his stomach, but since Claimant said it was not too severe, he [RG] did not make any injury report."

Mr. Y, the plant superintendent, testified his first conversation with claimant was on September 30th, and the first time he heard of a hernia was on October 1st. Mr. Y also testified that as claimant was a temporary employee and that as the cottonseed receiving season was drawing to a close, claimant was laid off on October 1st. Mr. Y stated claimant was not offered any light duty position.

Claimant first saw (Dr. F) on October 7, 1992 ". . . for evaluation of pain in his right groin" and injury in his low back, left shoulder and left ankle. Dr. F found "no evidence of injury regarding [claimant's] low back, left shoulder and left ankle." In an initial medical report dated 10/7/92, Dr. F diagnosed a recent right inguinal hernia, put claimant on light duty and referred claimant to (Dr. K) for surgical repair of the hernia and disability determination. Dr. K scheduled claimant for surgery on 10/16/92 but this was ". . . cancelled by patient due to denial for compensation by employer." Subsequently, Dr. F filed a Report of Medical Evaluation (TWCC-69) certifying maximum medical improvement (MMI) on 12/18/92 with zero percent impairment. The hearing officer notes that Dr. F's TWCC-69 "is inconsistent within itself," apparently contains a typographical error (the hearing officer speculates that when the doctor states he "can not assume he has reached MMI" to probably mean the doctor can now assume claimant has reached MMI), "but in light of the fact that Claimant cancelled the surgery because Carrier refused to pay medical benefits renders the internal conflict in the report moot. . . ."

The hearing officer finds that claimant fell on (date of injury), "experienced pain in his shoulder, side, back and ankle," reported the accident to claimant's lead man (RG) within a few days of (date of injury), and that claimant suffered a hernia "as the result of the fall on August 8, (sic) 1992." (The hearing officer states August 8th; however, there was absolutely no evidence regarding anything occurring on August 8th, therefore we believe the hearing officer meant (date of injury).) The hearing officer further found that claimant was released for light duty on October 7th, that claimant had been laid off by employer on October 1st, and that no light duty was available on October 7th. The carrier appeals alleging four issues it believes contain error.

I.

Carrier alleges the hearing officer erred in concluding the claimant has suffered disability as a result of the alleged injury of (date of injury).

Carrier alleges claimant initially "only complained of back, shoulder, ankle and side problems related to this alleged fall." (emphasis added.) Further, carrier argues, Dr. F in recording claimant's history, seems to be separating the hernia problems from the other problems, that claimant "was not relating his hernia to the alleged injury . . ." and that the hearing officer's "reliance upon any disability produced by the hernia is improper . . . ." The hearing officer is the sole judge of the weight and credibility to be given to the evidence. Article 8308-6.34(e). The claimant testified he had pain in his abdomen as the result of the fall, RG in his written statement conceded claimant "complain to me about some pain he was having on right side of his stomach" and even carrier in its allegation of error, cited above, concedes claimant complained of side problems related to the fall. There is ample evidence to support the hearing officer's findings and conclusions that claimant sustained a hernia in the fall and that the unrepaired hernia is the source of claimant's inability to obtain and retain employment at his preinjury wage due to the compensable injury (i.e., the fall on (date of injury)).

II.

Carrier alleges the hearing officer erred in concluding that the claimant notified his employer of his alleged injury within 30 days of (date of injury) in accordance with Article 8308-5.01.

The claimant testified he reported the fall and injury "more than three or four times" to RG who was claimant's lead man. Carrier states that "claimant argues his alleged statements to [RG] about a fall and pain in his back and side constitute sufficient notice under the requirements of Article 8308-5.01." (Emphasis added.) Carrier cites two cases and Texas Workers' Compensation Commission Appeal No. 91016, decided September 6, 1991, for the proposition that "requires the employer to be made aware of the general nature of the alleged injury and that it arose out of the employee's work." The claimant reported the fall and "pain in his right side" to his lead man, RG. The claimant at that time may not have known he had a hernia, notwithstanding he had had a left side hernia repaired in 1987, but merely reported a pain in his right side. We note that carrier cites DeAnda v. Home Insurance Co., 618 S.W.2d 529 (Tex. 1980) which holds that to fulfill the purposes of the statutory notice requirements, the employer needs only to know the general nature of the injury and the fact that it is job related. Appeal No. 91016, *supra*. Carrier argues "[t]hat did not occur here." The hearing officer specifically found that claimant reported the accident and resulting injury to RG and that the report of the injury included pain in his right side. Claimant is not required to name, with medical specificity, the exact nature of his injuries, provided that the employer has been notified of the general nature of the injury and that it is job related. That was done in this case with the notice to RG, claimant's lead man, that claimant had pain in his right side. There is no requirement that the plant superintendent be notified of the accident, but rather notice of injury to employee's foreman

(or lead man in this case) is notice to the employer. Hotchkiss v. Texas Employer's Insurance Ass'n, 479 S.W.2d 336 (Tex. Civ. App.-Amarillo 1972, no writ). *See generally* Texas Workers' Compensation Commission Appeal No. 92370, decided September 10, 1992.

III.

Carrier alleges the hearing officer erred in concluding claimant sustained an injury in the course and scope of his employment as being against the great weight and preponderance of the credible evidence.

Carrier reargues that "the evidence is overwhelming that the alleged fall of (date of injury) did not cause this hernia." We do not agree. Claimant's allegation that a fall occurred on (date of injury) is unrefuted. Claimant reported the accident and the injuries, including a pain in his right side, to his lead man. The fact that RG did not report the accident promptly to the plant superintendent does not detract from claimant's position that the accident occurred and was reported promptly to the lead man. The only inconsistent evidence is in Dr. F's report which seemingly would indicate one accident involving the back, shoulder and ankle and another incident where claimant "noticed severe pain in his right groin." Where there are inconsistencies the hearing officer may believe one witness and disbelieve others and may resolve inconsistencies in the testimony of any witness. McGalliard v. Kuhlmann, 722 S.W.2d 694 (Tex. 1986). In resolving the inconsistencies, the hearing officer may accept some parts of a witness' testimony and reject other parts of that testimony. The hearing officer obviously resolved the inconsistency in claimant's favor, as he was permitted to do.

IV.

Carrier alleges the hearing officer erred in admitting into evidence, over objection, the employer's First Report of Injury in contravention of Article 8308-5.05(b).

Claimant offered as his Exhibit No. 1 the Employer's First Report of Injury (TWCC-1). Carrier objected, citing section 5.05(b). The hearing officer overruled the objection stating that the TWCC-1 would not be considered as an admission against the employer. The carrier alleges the TWCC-1 should not be admitted for any purpose.

Article 8308-5.05(b) states:

> This report and any report made under Section 7.03(b) of this Act may not be considered admissions or evidence against the employer or the insurance carrier in any proceeding before the Commission or a court in which the facts set out in that report are contradicted by the employer or insurance carrier.

The statute, cited above, would indicate that the TWCC-1 may not be considered admissions or evidence against the employer or carrier in which the facts set out in that report are contradicted by the carrier. In the instant case, no other reference, evidence, or information was used from the TWCC-1 after its admission. The cases cited by carrier all deal with situations where the report of injury is being used to cross-examine or impeach a witness. In Texas Employers Insurance Association v. Shiflet, 276 S.W.2d 942 (Tex. Civ. App.-Texarkana 1955, no writ) the contents of the report of injury were read to the jury. The court held that "the introduction of this harmful, prejudicial and highly incompetent evidence" should have sustained appellant's motion for mistrial. Similarly, in Texas Employers Insurance Association v. Henson, 569 S.W.2d 576 (Tex. Civ. App.-Beaumont 1978, no writ) the court held it error in allowing claimant to read from the report of injury because employer would be reluctant to make a full disclosure on the report "if the report could later be used as an admission to corroborate evidence of disputed fact or facts." That was not the situation in the case before us, as no information from the TWCC-1 was used as an admission or to corroborate evidence of disputed fact or facts. Nevertheless, it is clearly the intent of the legislature that the TWCC-1 not be used against the employer or carrier. None of the information or facts on the TWCC-1 were contradicted by the carrier and, in fact, were never used after introduction of the report for any purpose. The hearing officer did not abuse his discretion in admitting the TWCC-1, as it was not used as evidence against the employer or carrier and none of the facts contained therein were contradicted by anyone. However, even if there was error in admitting the TWCC-1, over carrier's objection, that error was harmless error in that the error was not reasonably calculated to cause and probably did not cause rendition of an improper judgment. Hernandez v. Hernandez, 611 S.W.2d 732, 737 (Tex. Civ. App.-San Antonio 1981, no writ).

In summary, when sufficiency of the evidence is being tested on review, a case should be reversed only if the findings are so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. In re King's Estate, 244 S.W.2d 660 (Tex. 1951); Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992. We do not so find. Rather, the hearing officer's determinations were supported by sufficient evidence.

The decision is affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge